company or its officers, but was not so justified as to matter addressed to the plaintiff personally, and not as an officer of the company.

It is conceived that the court was correct in its conclusion. To hold the contrary, indeed, would be to assert that an executive officer has the right to determine what person or persons shall be excluded from the right to use the mail service; and such a doctrine, it would seem, is not only entirely inconsistent with a proper sense of justice, but unwarranted by the authorities.

The injunction in the present case was granted upon two grounds. The court says, in the first place, that the plaintiff, as a citizen of the United States, had a property right in the use of the mails, and that the action of the postal authorities deprived him of that right without due process of law, thus violating the Fifth Amendment to the Constitution of the United States. It is submitted that this view, which illustrates strikingly the present tendency of courts to interpret the Fifth Amendment liberally, goes too far, and puts a meaning on the word "property" not contemplated by the framers of the Constitution. The court claims also that the transaction amounted to a violation of the Fourth Amendment, securing the people against unreasonable searches and seizures of their papers and effects. This is believed to be the correct ground upon which to rest the decision, for the right secured by the Fourth Amendment extends to private papers in the mail as well as to those in one's own household.

RECENT CASES.

ADMIRALTY — JURISDICTION — LIENS UNDER STATE STATUTE. — A Massachusetts statute gave a lien for repairs and supplies furnished in the home port. *Held*, that the process was one *in rem*, and enforceable exclusively in the Federal District Courts, and the State Courts had no jurisdiction. *The Glide*, 17 Sup. Ct. Rep. 930; *Atlantic Works* v. *Tug Glide*, 157 Mass. 525, reversed.

The reasoning is briefly stated at the end of the opinion. By the laws of the United States the Federal District Courts have exclusive maritime and admiralty jurisdiction; the lien on a vessel is a *jus in re* and a maritime lien to secure the performance of a maritime contract, and equally within the maritime jurisdiction whether created by the common law or by statute. Although the common law gave a lien for repairs furnished a foreign vessel and the Federal courts had exclusive jurisdiction, *The Moses Taylor*, 4 Wall. 411, it gave none for those furnished to a home vessel. Such a lien, if it existed, would be enforced in the same way and be subject to the same jurisdiction as one existing without a statute. *Atlantic Works* v. *Tug Glide*, *supra*, Morton, J., dissenting. The statute gives the cause of action; the exclusive jurisdiction existed before. The characteristic opinion by Mr. Justice Gray presents a full review of the authorities.

CONSTITUTIONAL LAW — COLLATERAL ATTACK — DE FACTO OFFICER. — A was convicted in a city police court created under a statute which was unconstitutional because it did not properly classify municipal corporations. On petition for *habeas corpus*, *held*, that the constitutionality of the statute was open, and that A was entitled to release as, the police court having no legal existence, the judge was not a *de facto* officer and his acts were void. *Ex parte Giambonini*, 49 Pac. Rep. 732 (Cal.).

While professing to follow *Buck* v. *City of Eureka*, 109 Cal. 504, the judge really disregards the rule which he himself laid down in that case. There a statute authorized a council to create an office to be filled in a certain manner. The office was not created, but a person appointed in the manner specified acted as officer and was generally recognized as such. He was held to be a *de facto* officer, as the office had a potential existence under the statute. In the principal case it was not claimed that a city police court could not exist under the Constitution; the only objection to the statute was that it contained improper classifications. It is hard to see any more potential existence in an

office which a statute authorizes a council to create than in one which a constitution authorizes the legislature to create. By the same principle of public policy, the acts of the officers under the statute and under the Constitution should be protected from collateral attack. *State* v. *Carroll*, 38 Conn. 449; *State* v. *Gardner*, 54 Ohio St. 24. A very different question arises if the legislature attempts to substitute a statutory office for one expressly recognized in the Constitution, as in *Norton* v. *Shelby County*, 118 U. S. 425, where the court allowed collateral attack.

CONSTITUTIONAL LAW — ENACTMENT OF STATUTES — IMPEACHMENT BY JOURNALS. — To ascertain whether or not the legislature in the passage of a bill complied with the requirements of the Constitution, the court may go back of the enrolled bill to see if the journals of both houses of the legislature show that the requirements of the Constitution were obeyed. *Cohn* v. *Kingsley*, 49 Pac. Rep. 985 (Idaho).

An enrolled act, signed by the proper officers, and filed in the office of the Secretary of State, will be held to have been enacted as enrolled, though the legislative journals show that in its progress through the legislature an amendment was adopted which is not included in the enrolled act. *McKennon* v. *Cotner*, 49 Pac. Rep. 956 (Oreg.).

The above cases bring out sharply the divergence of opinion which exists as to the effect which should be given the enrolment of a statute. See 10 HARVARD LAW REVIEW, 380. The only view which can be supported on sound principle is that the certificate of enrolment is unassailable by the journals of the legislature, whether to show an omission of an amendment, or a failure to comply with some form required by the Constitution. This doctrine does not deny the right of the judiciary to declare a law unconstitutional, under fitting circumstances; it simply requires the court to respect the only evidence which can properly be before it, — the solemnly authenticated record of the legislature. That body, as it has the power to pass a law, must necessarily have as an incident the right of directing what shall be the supreme evidence of its authenticity. For the judiciary to permit the record to be controlled by journals, which, from the nature of things, are likely to be irregular and inaccurate, does not comport with decency of procedure, and with the respect due to co-ordinate departments of government. *Pangborn* v. *Young*, 32 N. J. Law, 29.

CONSTITUTIONAL LAW — JURISDICTION — ADMINISTRATION OF ESTATE OF SUPPOSED DEAD MAN. — *Held*, that a statute authorizing a probate court to administer the goods of a man who has not been heard of for seven years, as if he were dead, and making that administration good even in case he turns out to be alive, is unconstitutional, as depriving a man of his property without due process of law. *Carr* v. *Brown*, 38 Atl. Rep. 9 (R. I.). See NOTES.

CONSTITUTIONAL LAW — RIGHT OF CITIZEN TO USE MAILS. — *Held*, that a citizen of the United States has a property right in the use of the mails for lawful purposes, of which he cannot be deprived without due process of law. *Hoover* v. *McChesney*, 81 Fed. Rep. 472. See NOTES.

CONTRACTS — INSURANCE — PROVISION FOR ARBITRATION. — *Held*, that a provision in an insurance policy, requiring the settlement out of court of all questions in dispute arising under it, is not invalid as ousting the jurisdiction of the court. *Raymond* v. *Farmers' Ins. Co.*, 72 N. W. Rep. 254 (Mich.); *Robinson* v. *Templar Lodge*, 49 Pac. Rep. 170 (Cal.).

It was suggested under the same heading in 11 HARVARD LAW REVIEW, 127, that the hostility of the courts to provisions for arbitration is gradually breaking down. It would be hard to find better illustrations of this than the above cases.

CRIMINAL LAW — FORMER JEOPARDY. — The defendant was tried on an indictment for murder in the first degree, and was found guilty of murder in the second degree. *Held*, he could be tried again for the higher offence after the verdict had been set aside on his own motion. *State* v. *Kessler*, 49 Pac. 293 (Utah).

The weight of authority on this point is *contra*. 1 Bishop, New Criminal Law, 1006. The generally accepted doctrine is that a conviction for an offence less than the highest charged is an acquittal of every higher degree of the offence, and that by moving for a new trial the defendant waives his constitutional defence of former jeopardy only in respect to the issue which has been found against him.

CRIMINAL LAW — PERJURY — INCRIMINATING TESTIMONY. — *Held*, that a witness in a pension examination who is manifestly ignorant of his constitutional right to keep silent as to incriminating matters, and who is not informed of it, cannot be convicted of perjury on subjects as to which he might have kept silent. *United States* v. *Bell*, 81 Fed. Rep. 830.

In *Counselman* v. *Hitchcock*, 142 U. S. 547, the provision in the Fifth Amendment as to the privilege of a witness was construed very liberally, on the ground that it ex-

presses an ancient and fundamental principle of English and American liberty. That this view is unsound historically, see 1 Jur. Soc. P. 456, and 5 HARVARD LAW REVIEW, 71. In the principal case the provision is construed even more liberally. It seems strained to construe a privilege not to testify as to crimes already committed into a grant of immunity from crimes not yet committed. It may seem a little hard to convict an ignorant man who not knowing his rights swore falsely; but it is submitted that the mitigating circumstances in this case are more properly considered in connection with the sentence to be imposed, or an appeal to the pardoning power, than in deciding on the rule of law.

DAMAGES — BREACH OF PROMISE OF MARRIAGE — AGGRAVATION. — In an action for breach of promise of marriage, defendant pleads, as a justification, unchastity in the woman, and fails to prove his plea. *Held*, though the plea was not made in bad faith, the damages might be aggravated on account of it. The plea is on the record, and will remain there as a continued reiteration of the charge against the plaintiff, and therefore a trifling verdict would not show that such charge was unfounded. *Kaufman* v. *Fye*, 42 S. W. Rep. 25 (Tenn.).

It is true that plaintiff suffers as much injury from such a charge being placed on the record in good faith as if it were done in bad faith. But this is a question of exemplary, not of compensatory damages, and to punish defendant for a *bona fide* plea is to put a penalty upon an honest endeavor to defend a suit. This consideration would seem to require a different result, even if the court is right in saying that the ground for aggravating the damages is that the plea is on record. But it may well be doubted if this is the true ground. It was decided in *Kniffen* v. *McConnell*, 30 N. Y. 285, that the introduction of this class of evidence under the general issue might be considered in aggravation of damages. That case could not rest upon the reason urged in the principal case, for there was no special plea on the record. Moreover, the result in the principal case is contrary to the reasoning on which exemplary damages are allowed in general, viz. to punish defendant because he has acted maliciously. A plea made in good faith has no tendency to show defendant in such a light. 2 Sedgwick on Damages, 8th ed., § 640.

DAMAGES — PROSPECTIVE — CONTINUING TRESPASS. — A railroad built its tracks on a street, under a license from the city. Plaintiff was an abutting owner, but purchased after the building of the road. *Held*, that he was entitled to recover the amount of damages accruing year by year, as for a continuing trespass. *Hoffman* v. *F. & P. M. R. R. Co.*, 72 N. W. Rep. 167 (Mich.).

This would seem to be a case of a permanent legal structure, for, if necessary in order to prevent removal of the tracks by legal process, the company can take plaintiff's easement by condemnation proceedings. Technically, the trespass is a continuing one, and damages can be recovered to the date of the writ only. *Pond* v. *Met. Elev. Ry. Co.*, 112 N. Y. 186. But on practical grounds, it would seem better to regard the injury as a permanent one and allow all damages, past and prospective, to be recovered in one action. *Stodghill* v. *C., B. & Q. R. R. Co.*, 53 Iowa, 341. As a matter of fact, all the damages are suffered at once. There is a permanent depreciation in value which has to be reckoned with in selling the property. That the judgment legalizes that which before was a wrong, is no more than is done by satisfaction of the judgment in the ordinary case of conversion.

EQUITY — BILL TO GET POSSESSION OF LAND. — *Held*, that one in whose favor a decision has been rendered in a contest before the United States Land Department, may maintain a bill in equity to obtain possession of part of the land involved, of which he has never been in possession, and which has for a long time been occupied by the other party, though the latter charges that the decision of the Land Office was obtained by fraud. *Barnes* v. *Newton*, 48 Pac. Rep. 190 (Okl.); dissenting opinion 49 Pac. Rep. 1074. *Woodruff* v. *Wallace*, 41 Pac. Rep. 357 (Okl.), followed.

The ground of the court for taking jurisdiction is that the remedy at law by action of forcible entry and detainer is slower than the remedy in equity. While this reason may justify the issuance of a preliminary injunction at the suit of one in possession to prevent irreparable injury by a destructive trespass, it is doubtful if it should be applied where, as in the principal case, the plaintiff is out of possession, and no danger of irreparable injury is shown. On the questions of fact involved in an action to get possession of land, it has always been considered that each party has a right to a jury trial, and even where equity has taken jurisdiction it has directed a trial at law under the equity court's control. An assumption of jurisdiction by equity which takes away this right to trial by jury should be made only with the greatest caution, and, as the dissenting judge points out, the authorities cited by the majority hardly justify it in the principal case.

EVIDENCE — DOCUMENTS — NOTICE TO PRODUCE. — The defendant was indicted, under a statute, for the misuse of public funds. Checks were traced into his possession. *Held*, that the prosecution might introduce secondary evidence of their contents, without first giving notice to the defendant to produce them. *State* v. *McCauley*, 49 Pac. Rep. 221 (Wash.).

The reasoning of the court, that notice is not necessary because the defendant cannot be compelled to produce, cannot be supported. Notice is given for the purpose of allowing the opposite party an opportunity to produce, and must be given unless the proceedings are themselves a notice. This was not shown to be the case here. The court cites 3 Rice on Ev., p. 45, for the proposition that notice need not be given "if the evidence in the case shows the document to be in the defendant's possession." The cases supposed to support this exception are all cases where the indictment is for larceny of the paper in question, or for forgery, and are therefore not in point. The opinion is short, and gives the impression that the court does not think that questions of evidence are worthy of investigation.

EVIDENCE — RIGHT OF STATE TO IMPEACH ITS OWN WITNESSES. — *Held*, that the State may impeach its own witnesses in criminal cases. *State* v. *Slack*, 38 Atl. Rep. 311 (Vt.). See NOTES.

EXECUTIONS — APPLICATION OF PROCEEDS. — Defendant, a sheriff, collected a sum of money on an execution in favor of plaintiff, and applied part of it on a tax warrant against plaintiff then in his hands for collection. *Held*, that plaintiff could recover the amount so applied. *Eaton* v. *McElhone*, 49 Pac. Rep. 695 (Kan.).

The reasoning in support of the decision is that money in the hands of a sheriff, collected on an execution, is in the custody of the law, and therefore is not subject to levy or garnishment. The force of this argument was clear when the sheriff was required actually to bring the money into court with the return of the writ. Now, however, the reason of the rule seems to fail, for the officer regularly pays it over at once to the judgment creditor, and could immediately levy on it again. It seems proper to reach the same result without such a useless proceeding, by allowing the sheriff to levy at once on the money while in his own hands. This view has been taken in Vermont, New Hampshire, New Jersey, and Tennessee, though the great weight of authority, beginning with *Turner* v. *Fendall*, 1 Cranch, 117, is with the principal case. See Freeman on Executions, § 130, and note.

GARNISHMENT — EXECUTORS AS GARNISHEES. — A was indebted to B, who recovered a judgment against A's executors. C, a creditor of B, attempted to garnish A's executors. The executors filed a disclosure, in which they admitted the judgment, and that the money was in their hands ready to be paid to those entitled to it. No order of distribution had been made by the probate court. *Held*, that the executors could not be garnished. Two judges dissenting. *Hudson* v. *Wilber*, 72 N. W. Rep. 162 (Mich.).

The authorities are practically unanimous in support of this case. These authorities rest on two grounds, viz., that the executor's liability is not a debt or property within the garnishment statutes, and that the money, being in the hands of an officer of the court, is in the custody of the law, and cannot be reached by an order from another court. The rule is not confined to executors and administrators, but applies to receivers, assignees in bankruptcy, and similar officers of court. In most jurisdictions, garnishment is allowed after final decree of the court appointing such officer, because it is said that the liability of the executor has then become fixed. But the soundness of such a result may be doubted. The court orders the executor to distribute the funds in a certain way, and to allow a different court to change this order would seem to be against public policy. For authorities, see Rood on Garnishment, § 27 *et seq.*

INSURANCE — CHANGE OF OWNERSHIP — BREACH OF CONDITIONS. — A policy of fire insurance, with the usual mortgage clause attached, stipulated that the mortgagees should notify the insurer of any change of ownership that came within the mortgagees' knowledge. A change of ownership occurred between the application for insurance by the mortgagees and the delivery of the policy. *Held*, that a failure to notify the insurer did not avoid the policy. *Pioneer Savings & Loan Co.* v. *Ins. Co.*, 49 Pac. Rep. 231 (Wash.).

The violation of a condition in a policy of insurance either avoids the policy or has no effect whatever. There is no half way ground, and the reasoning of the court that the breach of such a condition sounds in damages simply, is utterly untenable. See May on Ins., 3d ed., § 156 *et seq.* But considering the well recognized temper of courts in construing policies strongly against the insurer, *Western, &c.* v. *Home Ins. Co*, 145 Pa. St. 346, the decision may possibly be supported on the ground that the property had changed hands before it was insured; and if the insurance company desired to be

notified of a change of ownership between the application and the issuance of the policy, they should have stipulated for it. *Day* v. *Ins. Co.*, 72 Iowa, 597. That is, when they issued the policy, they insured the property as it then was; *Dooly* v. *Ins. Co.*, 16 Wash. 155. Although other reasons are often advanced for such strict construction of policies by modern courts, it is submitted that the only sound ones are, first, the common-law rule applicable to all promises in writing, and, secondly, that the insurance company is an expert in the business.

MORTGAGES — ACTION OF TORT FOR WRONGFUL SALE UNDER A POWER. — *Held*, that a mortgagee who wrongfully exercised a power of sale before default is liable to the mortgagor in an action of tort for the full value of the land, although the purchaser from the mortgagee holds subject to the mortgagor's right to redeem. *Rogers* v. *Barnes*, 47 N. E. Rep. 602 (Mass.). See NOTES.

PERSONS — ALIENATION OF HUSBAND'S AFFECTIONS. — *Held*, a married woman can maintain an action against persons who wrongfully entice her husband from her and alienate his affections. *Lockwood* v. *Lockwood*, 70 N. W. Rep. 784 (Minn.).

The gist of this action is the loss of *consortium*. There seems to be some doubt whether the wife could maintain the action at common law. *Lynch* v. *Knight*, 9 H. L. Cas. 577. But since by statute the wife is now permitted to sue, for her own benefit, for personal wrongs done her, this action is allowed her in most jurisdictions. See Cooley on Torts, 2d ed., 228. The Maine and Wisconsin courts have, however, denied the wife this remedy. *Doe* v. *Roe*, 82 Me. 503; *Duffies* v. *Duffies*, 76 Wis. 374.

PERSONS — MARRIAGE — FRAUD. — *Held*, concealment by a woman from her husband at the time of her marriage of the fact that she is pregnant by another man does not render the marriage void. *Moss* v. *Moss*, [1897] P. 263.

In the course of a well reasoned and technical opinion the court discusses early English text-writers and *dicta* in support of its view, and a number of American authorities opposed to it, of which the leading case is *Reynolds* v. *Reynolds*, 3 Allen, 605. The decision in the latter case is based upon the ground that pregnancy by another at the time of marriage is in violation of the *essentialia* of marriage, because the wife is incapacitated from bearing her husband children, and he is forced to choose between receiving into his family a child not his, or asserting that his wife is unchaste. The court in the principal case, following the criticism of Bishop on Marriage, §§ 483–499, argues that the disability is temporary only, and that the presumption of legitimacy, although strong, is rebuttable, and if the husband does rebut it he is in no worse plight than if he unwittingly had married merely an unchaste woman, for which it is well settled that he cannot have the marriage declared void. Although Bishop is inclined to justify the result of *Reynolds* v. *Reynolds*, *supra*, on grounds of public policy, the court logically refuses to follow him, and adheres strictly to the principle that actual consent alone is essential, and that fraud inducing the consent is immaterial. Ayliffe's Parergon, 362.

PLEADING — ABATEMENT — PENDENCY OF ANOTHER ACTION FOR SAME CAUSE. — A plea in abatement, alleging that another action for the same cause was pending at the commencement of the suit, but not at the filing of the plea, was *held* properly overruled. *Winner* v. *Kuehn*, 72 N. W. Rep. 227 (Wis.).

The decision follows *Bates* v. *Chesebro*, 32 Wis. 594, and overrules a *dictum* in *Le Clerc* v. *Wood*, 2 Pinney, 37. Some authorities hold that every action commenced during the pendency of another for the same cause is vexatious, and must abate. *Parker* v. *Colcord*, 2 N. H. 36. The Wisconsin court conceded this to have been the strict common-law rule; but apart from a statement in 1 Bac. Abr. tit. Abatement, M. 65, little direct English authority can be found for such a proposition. Cf. *Green* v. *Watts*, 1 Ld. Ray. 274. The earlier cases discuss in what actions a plea of *lis pendens* might be filed in abatement of the writ before declaration made, but do not decide the present question. *Sparry's Case*, 5 Co. 61. According to the principles of common-law procedure, it is difficult to see how a plaintiff can succeed in an action in which he was not entitled to recover at the time it was brought; but to compel him to institute another would produce that multiplicity of suits which the defence of *lis pendens* was designed to prevent. It is not surprising, therefore, that the doctrine of the principal case is accepted in most of the United States. *Leavitt* v. *Mowe*, 54 Md. 613.

PROPERTY — RIPARIAN RIGHTS — DIVERSION BY GRANTEE. — An upper riparian proprietor granted to the defendant, a non-riparian owner, a right to lay pipe across his land for the purpose of taking water. This use slightly diminished the supply of water of the plaintiff, a lower proprietor. *Held*, that the use of the water was appurtenant to the riparian land, and, as against the plaintiff, the defendant had no right to

divert the water, and that the court would enjoin him from so doing, without regard to the amount of the plaintiff's injury. *Gould* v. *Eaton*, 49 Pac. Rep. 577 (Cal.).

The case is exactly like *Ormerod* v. *Todmorden Mill Co.*, 11 Q. B. D. 155, 172, where Bowen, L. J., approving *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300, says, "The right of the riparian owner may be compared to a right of common appurtenant for cattle levant and couchant upon the land; this right cannot be aliened from the land." See, to the same effect, *Garwood* v. *R. R. Co.*, 83 N. Y. 400, where the defendant, although a riparian owner, was enjoined from using the water to supply its locomotives, because it was not used up on the land. The court also implies that there must be some injury to the plaintiff. *Elliot* v. *Fitchburg R. R. Co.*, 10 Cush. 191. But whether an injunction should be granted for a slight injury is questionable, *Earl of Sandwich* v. *Great Northern R. R. Co.*, 10 Ch. Div. 707, and an action at law would have served as well to prevent the running of the Statute of Limitations.

PROPERTY — REVOCATION OF LICENSE — BREACH OF CONTRACT. — Plaintiff and defendant agreed that defendant should let his wall to plaintiff for bill-posting at a certain sum per annum. In an action of contract for withdrawing the permission, it was held that, although the license was revocable, this action was maintainable. *Kerrison* v. *Smith*, [1897] 2 Q. B. 454.

The decision is undoubtedly sound, and is probably law in this country as well as in England. The argument on the other side is that the plaintiff paid for a revocable license, and that, having received what he bargained for, he should not be heard to complain because the licensor exercised his option to revoke. It is far more probable, however, that the latter contracted not to exercise this option; and this was probably what the court had in mind when it said that the trial judge should not have nonsuited the plaintiff, but should "have gone on with the trial in order to ascertain what the contract really was." The case of *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402, involved the same question, but the point was rather assumed than decided.

PUBLIC OFFICER — LIABILITY FOR PUBLIC MONEYS. — Where a city treasurer, pursuant to statutes requiring him to deposit city funds, exercised prudence in the selection of a bank of good standing wherein to deposit the funds, and was free from negligence in permitting them to remain there, *held*, he was not liable for the loss of the funds by the failure of the bank. *City of Livingston* v. *Woods*, 49 Pac. Rep. 437 (Mont.).

In an action on the official statutory bond of a county treasurer for public moneys collected by him, *held*, that the fact that the moneys were deposited in a solvent banking institution which failed and caused loss, was no defence. *Gartly* v. *People*, 49 Pac. Rep. 272 (Colo.). Goddard, J., dissenting.

It is interesting to find in the same volume of the reporter another decision on each side of this important question about which there is such conflict. They discuss the four existing theories, and carefully analyze the authorities. The principal cases rest on opposite views of the broad question of a public officer's liability for public moneys. But the second case is weakened by a strongly reasoned dissenting opinion, and the first by the existence of the statute requiring the funds to be deposited, which one of the judges very properly considers sufficient to decide the case. See 10 HARVARD LAW REVIEW, 126, 386, for other late decisions and collection of authorities.

STATUTE OF LIMITATIONS — ACTION ON ADMINISTRATOR'S BOND. — A, an administratrix, upon her removal, failed to turn over assets of the estate to B, her successor, as required by statute. She was at the time out of the State, and remained away four years. On her return, B brings an action against A on her bond, joining her sureties. The period of limitation on contracts in writing is five years; on "a liability created be statute," three years. No statute has run in favor of A because of her absence. *Held*, that the action against the sureties is on "a liability created by statute," and is therefore barred. *Davis* v. *Clark*, 49 Pac. Rep. 665 (Kan.).

A surety's liability is generally measured by the instrument that he signs, Brandt on Suretyship, § 93, and the application of the three years Statute of Limitations in the principal case seems strained. The court cites as its authority *Ryus* v. *Gruble*, 31 Kan. 767, and *Commissioners* v. *Van Slyck*, 52 Kan. 622. See also *State* v. *Blake*, 2 Ohio 147, accord. These cases take the ground that an officer's bond is merely collateral security, and that if the action on the principal obligation arising out of his duty as an officer, is barred by any Statute of Limitations, then the security is no longer in force. Assuming that the lapse of the statutory period not only bars the remedy but also extinguishes the right, as some courts have held, these cases may be supported. But they hardly furnish authority for the principal case, where no statute has run in favor of the administratrix, because of her absence from the State.

TORTS — ACTION FOR DEATH — MEASURE OF DAMAGES. — Plaintiffs brought action against defendant for negligently causing the death of their thirteen year old son,

Held, that the jury are not restricted to an allowance for the value of the son's services during minority, but may take into consideration pecuniary benefits which the parents may reasonably be expected to receive from him after reaching his majority. *Atchison, &c. R. R. Co.* v. *Cross*, 49 Pac. Rep. 599 (Kan.).

The conflict of authority on this point seems hopeless, and Sedgwick and Sutherland take opposite sides. The weight of decided cases is apparently with Sedgwick and against the above ruling, but the argument from the analogy of cases where recovery is allowed for the death of persons not minors is equally strong the other way. The ground of recovery there, is not a legal right to services or support, but reasonable expectation of pecuniary benefit from the continuance of life, and why not apply the same principle here? See Sedgwick on Damages, 7th ed., 538, foot-note, and Sutherland on Damages, 2d ed, §§ 1273, 1274, and cases cited.

TORTS — PROXIMATE CAUSE. — Plaintiff alleged that he was employed provisionally by A until a bond for his good conduct could be secured from B, and that defendant, maliciously and with intent to deprive plaintiff of his employment, made false statements to B, by reason of which B refused to furnish the bond, and plaintiff was in consequence discharged by A. *Held*, on demurrer, that these facts would not entitle plaintiff to recover, as the voluntary act of a third party, B, intervened between defendant's act and plaintiff's damage, especially as it was not shown that B's act was reasonable. *McDonald* v. *Edwards*, 46 N. Y. Supp. 672.

The court makes the case turn squarely on the question of legal cause, and adopts the doctrine of *Vicars* v. *Wilcocks*, 8 East, 1, and *Lynch* v. *Knight*, 9 H. L. Cas 577; cases which have been severely criticised on this point. It is hard to see why the intervening act of a third party should break the causal connection, when that act was intentionally brought about by the defendant, knowing that it must under the circumstances result in the dismissal of the plaintiff. To say that the act must also have been a reasonable one on B's part is requiring too much. For a full discussion of the question, see 2 Smith L. C., 10th ed., 506, under *Vicars* v. *Wilcocks*.

TRADE SECRETS. — Equity will enjoin a defendant from revealing a secret, though unpatented, process for the manufacture of fly paper where he learned the secret in the confidential employ of the inventor. *Thum Co.* v. *Tloczynski*, 72 N. W. Rep. (Mich.) 140. See NOTES.

TRUSTS — POWER OF ATTORNEY — EFFECT AS TRUST DEED. — B, when near death, delivered to P his savings bank pass book and a power of attorney, by which he appointed P his attorney to draw a certain sum for herself, another sum for funeral expenses, and the balance to be distributed among certain persons. *Held*, that the instrument, though invalid as a power of attorney after B's death, was good as a trust deed of personal property, and vested the title in P, although an implied power of revocation of the trust remained in B, which he might have exercised had he recovered. *Tusch* v. *German Savings Bank*, 46 N. Y. Supp. 422.

The decision is sound, but the reasoning seems erroneous. It would be contrary to all legal principles and precedents to transform a power of attorney into a deed, and there is no need of attempting it, although the court seems to think a deed necessary to establish a trust and to give the trustee title to the book. A savings bank book is, like a certificate of stock, a chose in action. There was here merely the gratuitous transfer of a chose accompanied with an express power of attorney, which was irrevocable because coupled with an interest, viz. the legal title to the book itself, which passed on delivery and is not merged in the chose in action. But the power of attorney by its terms contained a declaration of trust. P was therefore entitled to the money, but it would be subject to a trust. See *Larrabee* v. *Hascall*, 88 Me. 511, where, although the power of attorney was implied and the declaration of uses was by parol, a result similar to that of the principal case was reached upon correct reasoning.

TRUSTS — TERMINATION. — *Held*, that a statute which assumes to furnish means by which the beneficiary can alienate his interest, and terminate a trust without the consent of the trustee, violates the constitutional provision against depriving one of property without due process of law. *Oviatt* v. *Hopkins*, 46 N. Y. Supp. 959.

A trustee has admittedly the legal title, but, whether the trust be active or passive, it is held solely for the benefit of the *cestui*, and the beneficial interest is the only one which the law now contemplates and seeks to protect by decision and legislation. Difficulties arise from the powerlessness of a court of equity to bring about a transfer of legal title from one to another, unless it has obtained jurisdiction of the holder of the title. To avoid these, various legislative acts have been passed in England and the United States to protect the *cestui's* interest.

In these acts the trustee's title is declared to be in certain cases vested in the court

of equity, which is then given power by mere decree to vest title in its appointee. Such provisions have been made for insane trustees, *Livingston* v. *Livingston*, 2 Johns. Ch. 537; infant trustees, *Re Wadsworth*, 2 Barb. Ch. 281; absent trustees, Mass. Pub. Sts. c. 141, § 7; death of trustees, Pub. Laws of N. Y., 1896, c. 547, § 91 a. Such acts are really acts of confiscation by the sovereign and a conveyance from him to the courts. But they have never been questioned constitutionally, because only a legal title and no real interest is confiscated. While no decision so stating has been found, yet it is believed that an examination of the cases will show that the constitutional provision, so generally adopted, applies only to beneficial interests. The act in the principal case is only an elaborate Statute of Uses, which statute might, so far as this decision goes, well be declared unconstitutional.

WILLS — DESIGNATION OF BENEFICIARY — RESERVATION OF POWER OF APPOINTMENT. — A testatrix devised all her property to whomsoever should care for her and furnish proper medical treatment, at her request, during the time of her life when she should need it. *Held*, that the devisee was sufficiently designated by the will, though not named, and that there was no reservation of the power of subsequent appointment of the devisee such as would render the will invalid. *Dennis* v. *Holsapple*, 47 N. E. Rep. 631 (Ind.).

It would seem that no testamentary act remained to be done in the principal case, and that the decision is therefore sound. *Stubbs* v. *Sargon*, 3 Mylne & Cr. 507. The disposition is complete, though the devisee is to be ascertained by future events. The volition of the testatrix is concerned only so far as making a request goes. While making an appointment would undoubtedly be a testamentary act, making a request, which may or may not be complied with, cannot fairly be so termed. Who will satisfy the description in the will is a matter dependent on an extrinsic contingency, and not on the act of the testatrix. 1 Redfield on Wills, 274.

REVIEWS.

STATE CONTROL OF TRADE AND COMMERCE. By Albert Stickney. New York: Baker, Voorhis, & Co. 1897. pp. xiv, 202.

This book is an historical analysis, both from the legal and from the economic points of view, of the question of State control of trade and of combinations to control rates. From the economic point of view there is much force in Mr. Stickney's position that combinations of employers to control prices stand on the same footing as combinations of employees to control wages. By an exhaustive review of authority, he shows that ancient legislation recognized this fact by not attempting to control one class without restricting the other also. It is then shown that all such legislation failed; statutes against monopoly and engrossment became dead letters, and were repealed. In view of the modern tendency to excessive legislation, a useful historical argument is here made in favor of allowing the economic machine to work out its problems without being clogged by useless laws.

From the legal point of view, Mr. Stickney proves historically that the common law has no more interfered with the liberty of men and companies to charge what prices they please, than it has restricted the right of laborers to fix their own wages and to combine in order to control wages. Statutes that limited this liberty are shown to have been repealed before the American Revolution, and thus never to have become a part of our common law. The author then considers other statutes that have been passed of late years, leading up to the Trust Act of 1890, which was recently applied in the Trans-Missouri freight case. The author believes that the statute did not apply to that case, and argues that neither common law nor statute, if properly construed, interferes with legitimate